

**STATE OF RHODE ISLAND
PUBLIC UTILITIES COMMISSION**

In re: Ecogy Energy Inc.’s : Docket No. 22-14-REG
Petition for Dispute Resolution :

Memorandum of the Division of Public Utilities & Carriers

I. The Petition

On July 15, 2022, Ecogy Energy Inc. (“Ecogy”) filed a Petition for Dispute Resolution.

The nature of the dispute, in Ecogy’s words is:

“This dispute arises from the 2022 First REG Program Open Enrollment. Pursuant to the Tariff and the REG Program Solicitation and Enrollment Rules ("Rules"), Ecogy timely applied for certificates of eligibility ("COEs") for five medium-scale solar projects and one small wind project (the "Six Projects"). On June 27, 2022, Rhode Island Energy (the "Company") notified Ecogy that the Six Projects were ineligible for COEs in the 2022 First Open Enrollment. The Company asserted that the Six Projects were ineligible because Ecogy had not complied with an alleged Tariff requirement to first "terminate" COEs for the same projects that were obtained in previous open enrollments. The Company further claimed that Ecogy was required to obtain the Company's consent to "terminate" the existing COEs.”¹

In support of its Petition, Ecogy referenced the fact that in a prior year, pursuant to a similar request by Ecogy, the Company had specifically advised Ecogy that it was not required to give up their original COEs until *after* receiving a new award.

“In fact, just a few months ago in the 2021 Third Open Enrollment, the Company - under its prior owner, National Grid - awarded Ecogy COEs for two medium-scale solar projects that, like the projects at issue in this Petition, had obtained COEs in a previous open enrollment. The Company advised Ecogy, in writing, that the proper procedure was for Ecogy to give up the existing COEs after the new award. Ecogy justifiably expected that the Company would follow the same procedure in 2022. It is unfair and unjustified for the Company to impose alleged solicitation

¹ Ecogy’s Petition at 1 (July 15, 2022); https://ripuc.ri.gov/sites/g/files/xkgbur841/files/2022-07/22-14-REG-Ecogy-Petition_7-15-22.pdf.

rules and procedures on Ecogy that are different from the rules and procedures that the Company followed just a few months ago under its previous owner.”²

Ecogy avers that it applied for COEs for each of the Six Projects in the 2022 First Open Enrollment because:

“...either (a) the project was unlikely to come on line within the mandatory 24 month period for medium-scale solar projects due to supply chain and/or permitting delays outside of Ecogy's control, and would therefore not receive incentive payments under its existing COE awarded in a prior enrollment round, making the project not financially viable; or (b) the project was unlikely to be financially viable even if completed before the applicable deadline due to additional post-award Company requirements and/or the unforeseen sharp escalation of construction and equipment costs across the entire industry in 2021 and early 2022.”³

Ecogy further asserted that it submitted applications for COEs for the Six Projects in the 2022 First Open Enrollment:

“...with the intention of relinquishing any rights to the existing COEs for those projects if the new applications were successful. This was the exact procedure followed by the Company in 2021, when Ecogy submitted open enrollment applications in the 2021 Third Open Enrollment for two other Ecogy medium-scale solar projects that had existing COEs that would no longer support the projects as intended.”⁴

Ecogy seeks an order from the PUC that directs the Company to award COEs to any and all of Ecogy's Six Projects that were competitively priced in comparison with other applicants in the 2022 First Open Enrollment.

II. Rhode Island Energy's Response

On August 11, 2022, Rhode Island Energy (“RIE”) filed its response to Ecogy's petition. In that response, RIE indicated that on July 7, 2022, the Company responded to Ecogy's Demand Letter by notifying Ecogy that it needed to terminate its existing COEs prior to bidding the same

² *Id.*

³ Petition at 6.

⁴ *Id.*

projects in future open enrollments and that, pursuant to the applicable Company Tariff, Ecogy needed the Company's permission to terminate its existing obligations.

On June 27, 2022, the Company notified Ecogy of its decision to deny the issuance of new COEs for the six Ecogy RI Projects as part of the 2022 First Open Enrollment for the RE Growth Program. The Company stated that it:

“denied the issuance of COEs because the Ecogy RI Projects that participated in the 2022 First Open Enrollment were the identical Ecogy projects that already have pending obligations stemming from COEs that were awarded through the 2020 - 2021 Program Year Open Enrollments. Each project already has an existing COE awarded per the Renewable Energy Growth Program Tariff for Non-Residential Customers (the “Tariff”). For all but one of the Ecogy RI Projects, a COE had been issued on June 24, 2021, with an Output Certification Deadline of June 24, 2023.”⁵

The Company requested that the Commission (1) find that Rhode Island Energy was not required to issue COEs to the Ecogy RI Projects and (2) dismiss Ecogy's Petition.

In its supporting memorandum dated September 13, 2022, the Company argued that Ecogy has failed to substantiate that its six projects were no longer financially viable. At best, the Company argues, Ecogy demonstrated that its anticipated future returns on these projects have been diminished. The Company also argues that Ecogy's expressed desire to capitalize on increased ceiling prices through new COEs does not entitle Ecogy to new COEs and having its obligations under the existing COEs terminated.⁶

The Company further argued that Ecogy was not eligible to bid due to its obligations to the Company under the existing COEs because it is not an Applicant in good standing under the enrollment rules. The Company's rationale for this assertion is that Ecogy has failed to update the

⁵ RIE's response to Petition at 1-2 (Aug. 10, 2022); <https://ripuc.ri.gov/sites/g/files/xkgbur841/files/2022-08/22-14-REG-RIE-Reply-Ecogy%208-10-22.pdf>.

⁶ Rhode Island Energy's Memo at 5 (Sept. 13, 2022).

Company, as required, on the total costs of their projects. The Company supports this position with Ecogy's responses to data requests wherein it only provided information on the CREST model. Finally, the Company argued that the financial consequences of allowing the rebidding of existing projects are significant and will negatively impact customers and the RE Growth Program.

ANALYSIS

III. The R.E. Growth Tariff & Enrollment Rules

The enrollment process for the RE Growth program is governed by the Tariff⁷ and the Enrollment rules.⁸ The Applicable sections of the Renewable Energy Growth Tariff for Non-Residential Customers are: (1) Introduction; (2) Section 3 - Performance Guarantee Deposit, subsection (i); and (3) Section 11, Termination Provisions.

Section 1- Introduction.

This Tariff applies to the Applicant for a DG project that is awarded a Certificate of Eligibility by the Commission or the Company pursuant to the Rules, and any successor Applicant for the Project. Upon being awarded a Certificate of Eligibility, a DG project has a defined period to meet all requirements to receive compensation pursuant to the Tariff, which is: (1) 48 months for a Small DG Project using hydropower; (2) 36 months for a Project using anaerobic digestion; or (3) 24 months for a Project using another eligible technology.⁹

The Applicant is required to update the Application information for the DG project, including but not limited to information concerning: the DG Project Owner, the Customer, the Bill Credit Recipient(s), the recipient of the Performance-Based Incentive Payments, proof of completed mandatory training from the Rhode Island Office of Energy Resources if the system is a self-install, and both the General Contractor registration number and the Electrician license number of the entities constructing the project.

⁷ Non-Residential Tariff for RE Growth; <https://www.rienergy.com/media/pdfs/billing-payments/tariffs/ri/regrowthnon-residentialtariff.pdf>.

⁸ Enrollment Rules <https://ngus.force.com/servlet/servlet.FileDownload?file=0156T00000FLuTb>

⁹ As solar projects, Ecogy's projects fall under a 24-month period to meet all the requirements for compensation.

Section 3. Performance Guarantee Deposit

Small-Scale Solar Projects and Medium-Scale Solar Projects are not required to submit a Performance Guarantee Deposit or provide an Output Certification. In order to receive Performance-Based Incentive payments under this Tariff, such projects will have 24 months after being awarded a Certificate of Eligibility to achieve operation at expected availability and capacity and meet all other requirements under this Tariff.

Section 11. Termination Provisions

The Applicant and the Customer shall comply with the provisions of this Tariff through the end of the term specified under the applicable Tariff supplement. The Applicant and Customer may not terminate their obligations under this Tariff unless and until the Company consents to such termination. The Company will not unreasonably delay or withhold its consent to an Applicant's request to terminate if the Applicant cannot fulfill the obligations because of an event or circumstance that is beyond the Applicant's reasonable control and for which the Applicant could not prevent or provide against by using commercially reasonable efforts.

Enrollment Rules

1.2.2.3 Eligible Facilities

To be eligible for an enrollment, a Project must: (1) be an eligible renewable energy resource under the R.E. Growth Program, as determined by the Board and approved by the Commission; (2) have a nameplate capacity equal to or less than five megawatts (5MW); (3) interconnect with the distribution system of The Narragansett Electric Company; and (4) be located in The Narragansett Electric Company ISO-NE load zone.

To apply, a distributed generation project must not be: (1) already operating; (2) under construction, except for preparatory site work that is less than twenty-five percent (25%) of the estimated total project cost; or (3) fully financed for construction, except to the extent that financing agreements are conditioned upon the election of the project in this program.

ARGUMENT

- 1. A DEVELOPER WITH AN EXISTING COE MUST UPDATE ITS APPLICATION INFORMATION WITH THE COMPANY AND SEEK TERMINATION OF AN EXISTING AWARD, PRIOR TO ANY ATTEMPT TO RE-BID IN SUBSEQUENT ENROLLMENTS.**

On its face, the foregoing Enrollment Rule, 1.2.2.3, does not specifically prohibit a developer from applying for a project that already holds a COE. Conversely, the rules do not

specifically authorize a developer with an existing COE to re-bid to re-apply in a later enrollment. However, as a practical matter, for a project to be awarded a COE in a current program year, the prior COE would necessarily be terminated. The parties' dispute revolves not only around the timing of the termination of an existing COE, but also as to the authority to terminate, and eligibility for bidding in an enrollment.

Although the enrollment rules are silent on this issue, the Tariff is not. As noted *infra*, obligations under an existing COE may not be terminated ***unless and until the Company consents to such termination***. When a developer with an existing COE realizes, for whatever reason, that it will not be able to comply with its required commercial operation date, it is required to update the Company, as required by the Tariff:

The Applicant is required to update the Application information for the DG Project, including but not limited to information concerning: the DG Project owner, the Customer, the Bill Credit Recipient(s), the recipient of Performance-Based Incentive Payments, ***the total cost of the project***, indication of whether the system is a "self-install" by the Customer/Project Owner, proof of completed mandatory training from the Rhode Island Office of Energy Resources if the system is a "self-install", and both the General Contractor registration number and the Electrician license number of the entities constructing the project.¹⁰

In the present case, there is no evidence to support a finding that Ecogy updated its total cost of the project, either before it submitted a bid in the First Enrollment of 2022, within its bids submitted in that enrollment, or during the course of discovery under this petition. In its discovery responses, Ecogy did provide argument and support for its position that costs for the projects have risen dramatically and that inflation and supply chain issues are seriously affecting the renewable energy industry generally.

¹⁰ Non-Residential RE Growth Tariff at Section 1.

2. THE COMPANY’S PRIOR ALLOWANCE OF A REBIDDING OF PARTICULAR PROJECT IN 2021 SETS NO PRECEDENCE.

There is evidence in the filing that, at least in 2021, National Grid allowed Ecogy to apply for a new COE for projects that had already been enrolled in 2020. The documentation suggests that the rationale was broadly related to the COVID 19 pandemic and resulting supply chain issues. In addition, at least as to projects in Tiverton, delays were encountered while the municipality decided to amend its zoning ordinance pertaining to solar arrays. Moreover, the evidence reveals that National Grid agreed to permit Ecogy to bid in an enrollment for a new COE, with the understanding that if it was successful, then termination of the existing COE would be a condition for the Company to issue the new COE.¹¹

The Company’s review of these prior projects and its grant of a conditional termination, based upon subsequent successful bids, presents no binding precedent on the Company as to other projects. In that case, prior to bidding, Ecogy had apparently reached out to the Company and explained its problems in connection with reaching commercial operation. Ecogy had evidently requested a conditional termination of its existing COE, depending upon a subsequent successful rebid. Whether the process followed by Ecogy and the Company was permissible is not being challenged here. However, such a process cannot bind the Company to a similar process, based upon the authority granted to the Company under the tariff. Moreover, to the extent that a “conditional termination” in advance of bidding is permissible, it is the Company that possesses that authority under Section 11.

¹¹ Ecogy Petition at 32 (Email dated October 20, 2021 from Tom Kender, National Grid, to Brock Gibian, Ecogy Energy).

3. **A PETITION FOR DISPUTE RESOLUTION IS NOT AN AVAILABLE AVENUE FOR A DEVELOPER TO SEEK HIGHER CEILING PRICES FOR PROJECTS WITH AN EXISTING COE.**

Ecogy has six existing COEs for various projects across the state. Ecogy initially asserted that it “has multiple projects that simply cannot be built with the prices that were offered in the Renewable Energy Growth (“REG”) Program in 2020 and 2021, requiring a re-bid to make the projects economical.”¹² Yet, in response to data request 1-2, Ecogy referred to its general comments made in Docket 5202, wherein it was advocating for higher ceiling prices generally in the RE Growth program. While Ecogy did provide information that some project costs had increased, it did not provide any specific financial data to establish that the projects were no longer financially viable.

Regardless of whether these projects can be built economically or not, there is no authority for the Commission to decide that particular issue in this proceeding. Ecogy has a process readily available to it under Section 11 the tariff to seek termination of its project and a corresponding obligation under that tariff to update its total projects costs for the Company to evaluate. In response, once presented with such a request, the Company may not unreasonably delay or withhold its consent to an Applicant’s request to terminate if the Applicant cannot fulfill the obligations because of an event or circumstance that is beyond the Applicant’s reasonable control and for which the Applicant could not prevent or provide against by using commercially reasonable efforts.

The Company argued in its filings that the fundamental purpose of the RE Growth Program is to facilitate and promote *new* installations of grid-connected generation of renewable energy.

¹² Ecogy Petition at 23 (Jul. 15, 2022); https://ripuc.ri.gov/sites/g/files/xkgbur841/files/2022-07/22-14-REG-Ecogy-Petition_7-15-22.pdf.

The purpose is not to afford developers the right to continuously rebid *existing* projects, for any reason. The Division agrees. The program is bid competitively under annually established ceiling prices and projects are bound under the terms of their award. To permit renewable energy developers a right to rebid projects, without seeking termination of their existing awards, will invite chaos in a rising-cost environment. As provided by the Company's memorandum, 48 of the 76 pending projects with existing COEs in the RE Growth program have Performance Based Incentives below the 2022 program year ceiling prices. If those projects all sought unilaterally capitalize on rising ceiling process by rebidding, the ratepayers could be on the hook for millions of dollars. The Division submits that the tariff's termination section, which provides an evaluative process, implements a beneficial protective public policy.

The Company must have the rights afforded to it under the tariff to determine whether to grant termination of a prior award. In a period of rapidly rising materials costs and inflation, such as presently being experienced in the industry, there may indeed be some situations where an Applicant cannot fulfill the obligations because of an event or circumstance that is beyond the Applicant's reasonable control and for which the Applicant could not prevent or provide against by using commercially reasonable efforts. However, such a determination requires the Applicant to request termination and submit appropriate documentation to support its claim, and for the Company to be permitted to exercise the authority granted to it by tariff.

CONCLUSION

For all of the foregoing, the Division urges the Commission to deny and dismiss Ecogy's petition.

Respectfully submitted:
Linda George, Administrator, Rhode
Island Division of Public Utilities
& Carriers

DATED: September 23, 2022

By her Attorney:

/s/ _____
Margaret L. Hogan, Esq. (#5006)
Rhode Island Division of Public
Utilities & Carriers
89 Jefferson Boulevard
Warwick R.I. 02888
401-780-2120
Margaret.l.hogan@dpuc.ri.gov